

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs July 10, 2007

**RICO M. GROSS v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Davidson County**  
**No. 2003-B-852 Cheryl Blackburn, Judge**

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**No. M2006-02266-CCA-R3-PC - Filed November 1, 2007**

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Petitioner, Rico M. Gross, appeals the post-conviction court's denial of his petition for post-conviction relief in which he alleged that his plea of guilty to the offense of second degree murder was not voluntarily and knowingly entered into, and that his trial counsel rendered ineffective assistance of counsel. After a thorough review of the record, we affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and NORMA MCGEE OGLE, JJ., joined.

Mary L. Mitchell, Nashville, Tennessee, for the appellant, Rico M. Gross.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. (Torry) Johnson III, District Attorney General; Bret Gunn, Assistant District Attorney General; and Benjamin Winters, Assistant District Attorney General, for the appellee, the State of Tennessee.

**OPINION**

Petitioner was indicted on May 9, 2003, on charges of first degree premeditated murder, first degree felony murder, especially aggravated robbery, and aggravated robbery. Petitioner entered into a negotiated plea agreement in which the State agreed to recommend to the trial court that Petitioner be sentenced to twenty years in exchange for Petitioner's plea of guilty to the lesser included offense of second degree murder, with the other charges dismissed.

At the plea submission hearing, the State offered the following factual basis for the plea:

Your Honor, in Case 2003-B-852, if it had gone to trial, the State's proof would be that the victim in this case was a Mr. Eric Gregory. It occurred on January 30, 2003,

in the James Cayce Homes public housing area here in Davidson County. He was with his girlfriend, Ms. Kenya Roper, and another girl named Kiana Walker. Unknown to Mr. Gregory and Ms. Roper, Ms. Kiana Walker had been in discussions with another group of people about robbing Mr. Gregory and/or Ms. Roper. That group of people were in route to that location because Ms. Walker had tipped them off to where they would be, and that group of people were Mr. Michael Farrell, Alcantarius Fentress, Mr. Gross, and Ms. Lavinia Johnson. They were in Ms. Johnson's car and she was driving, so they arrived there at the time that Mr. Gregory was just pulling up in the vehicle. The three men got out of the car. They had guns. Mr. Farrell was more or less the leader of the group. They demanded money from Mr. Gregory. Mr. Farrell was the one who actually fired all the shots, the ones that struck Mr. Gregory and killed him. Mr. Gross was there, was present and did assist by gathering up some of the money after Mr. Gregory was shot. They got back in the car with Ms. Johnson, drove away from the scene, rented a motel where the police caught them because Ms. Walker eventually admitted her role in setting this up.

The trial court explained to Petitioner each of the charged offenses, the respective range of sentencing for each offense, and the possibility of the imposition of consecutive sentencing. Petitioner said that he understood that he could only be convicted of one murder charge if he proceeded to trial. Petitioner acknowledged that he was entering a plea of guilty to a lesser included offense, second degree murder, and that he understood he would serve 100 percent of his sentence less any credit he might earn while incarcerated.

Petitioner assured the trial court that his trial counsel had discussed the State's discovery with him, and reviewed any possible defenses and witnesses. Petitioner said that he had earned his G.E.D. Petitioner acknowledged that his trial counsel had read over the plea agreement with him, and that he had read the plea agreement to himself.

The trial court explained to Petitioner the constitutional rights he was waiving by entering a plea of guilty, and Petitioner said he understood the consequences of his plea. The trial court discussed the theory of criminal responsibility with Petitioner, and Petitioner stated that he understood that he could be held responsible for what someone else does because he participated in the offense. Petitioner said he was satisfied with his trial counsel's assistance.

## **II. Post-Conviction Hearing**

Petitioner's trial counsel testified that he represented Petitioner for approximately one year and met with Petitioner seventeen times during this period. Trial counsel and Petitioner discussed over several months the advantages and disadvantages of entering a plea of guilty. Trial counsel believed that the main strength of Petitioner's case was the fact that he was not the shooter, and he and Petitioner also discussed a defense based on coercion. Trial counsel told Petitioner that if they presented a defense to the charges, Petitioner would have to testify.

Trial counsel said that he discussed with Petitioner the pre-trial motions he had filed in the case and explained the purposes of the motions. He could not remember, however, if he gave physical copies of the motions to Petitioner. Trial counsel hired an investigator to assist in the preparation for trial. The investigator interviewed Ms. Roper and verified her story. Trial counsel and the investigator interviewed the State's witnesses and various family members. On April 21, 2004, trial counsel and Petitioner reviewed the video tapes of Petitioner's two interviews with the investigating officers.

Trial counsel and the investigator met with Petitioner in March 2004 and discussed the potential testimony of the State's witnesses. Trial counsel said that Petitioner grew angry when he heard that the witnesses would testify that Petitioner had taken an active role in the robbery. Petitioner ordered trial counsel and the investigator out of the room. In April 2004, Petitioner wrote trial counsel:

See, that is the whole problem. You never do what I tell you to do. I told you to super [ace] my case, you didn't. I told you to fire yourself, you didn't. I don't feel if you represent me [on] this. I don't have no say so on my case. So if you don't take yourself off my case then my next letter will be to [Judge] Blackburn.

Trial counsel said that as a result of Petitioner's letter, he filed a motion to withdraw which was denied by the trial court. Trial counsel said that Petitioner became more cooperative after the motion hearing, and Petitioner and trial counsel met several times over the next month. Trial counsel said that Petitioner understood that he had the right to participate in his own defense.

Petitioner telephoned trial counsel from the jail twice on April 26, 2004, five days after he had reviewed with trial counsel his taped interviews with the police. Petitioner told trial counsel that he had decided to enter a plea of guilty and asked trial counsel to set a court date. Trial counsel filed a motion to suppress Petitioner's statements to the police on April 28, 2004, to protect Petitioner's interests should he ultimately decide not to plead guilty. However, trial counsel did not think the motion would be granted.

Petitioner's plea submission hearing was set for May 6, 2004. Prior to the hearing, Petitioner asked trial counsel to arrange an interview with the prosecutor. The prosecutor spoke briefly with Petitioner, outlined the evidence against Petitioner, and refused Petitioner's request for a recommended sentence of fifteen years instead of twenty. Trial counsel said that Petitioner then spoke with his brother by telephone for about twenty-five minutes, after which he told trial counsel he was ready to enter his plea of guilty.

On cross-examination, trial counsel acknowledged that Petitioner's main difficulty was his initial inability to understand the concept of criminal responsibility. Petitioner did not understand why he should be sentenced to twenty years when he was not the shooter. Trial counsel said he told Petitioner, as an example, about a similar case he tried in March 2004, where the defendant was found guilty of first degree felony murder under a theory of criminal responsibility. Trial counsel

told Petitioner he was potentially looking at a sentence of eighty-eight years if the trial court imposed consecutive sentencing.

Trial counsel acknowledged that he received a letter from Petitioner on March 4, 2004, which stated:

I'm writing to let you know that I done [sic] thought it [through] and you[re] right, 20 years is better than life. So now I want to see if you get the D.A. down close to 15 years, and I will probably consider it. [I] would also like for you to come up here as soon as possible so I can talk to you about my options.

Trial counsel said he opened discussions with the prosecutor about a potential recommended sentence of fifteen years, but the prosecutor would not agree to recommend a sentence of less than twenty years. Petitioner then wrote his letter asking trial counsel to withdraw from the case.

Trial counsel stated that he spent several hours at the crime scene and reviewed every piece of physical evidence.

On redirect examination, trial counsel said that Petitioner understood the incriminating portions of his taped interviews. Trial counsel said that one of the police officers asked Petitioner how much money he received from the robbery. Petitioner responded, "Five to six hundred, not nearly enough." Trial counsel said that his motion to suppress was based on an allegation that Petitioner was intoxicated during the initial interview. Trial counsel said that Petitioner acknowledged on the waiver of rights form that he had been drinking on the night of the incident. Trial counsel, however, did not believe that Petitioner appeared intoxicated during the interview which was conducted several hours after the shooting. Trial counsel said that he made copies of all of the State's discovery and reviewed the evidence with Petitioner. Trial counsel asked Petitioner to note any discrepancies in the witnesses' statements or other irregularities, and Petitioner responded to his request.

Petitioner testified that he was twenty years old when the offense was committed. Petitioner said that his trial counsel forced him to enter a plea of guilty to the charged offense. Petitioner said that trial counsel never explained to him that if he went to trial he could be convicted of a lesser offense, or be sentenced to less than the maximum in the sentencing range. Petitioner said that trial counsel did not explain that the trial court could impose concurrent sentencing. Petitioner said that trial counsel never discussed the strengths of his case, only the weaknesses. Petitioner said that Ms. Roper lied to the investigating officers when she said that he and his co-defendants took money from the victim, but trial counsel did not believe him.

Petitioner said that before the guilty plea submission hearing, the prosecutor told him he would be sentenced to life in prison if he went to trial and that he was "half responsible" for the victim's death. Petitioner said that he was scared and started crying.

Petitioner said that he never saw any copies of the pre-trial motions, including the motion to sever and the motion to suppress his statement, and trial counsel did not tell Petitioner he had filed them. Petitioner said that reviewing the pre-trial motions, particularly the motion to suppress, would have impacted his decision to plead guilty.

Petitioner stated that trial counsel told him to agree with anything the trial court asked him during the guilty plea submission hearing. Petitioner said that was why he told the trial court that he was satisfied with trial counsel's representation, and he insisted that his response to the trial court was not true. Petitioner acknowledged that he would not have entered a plea of guilty if trial counsel had told him about the strengths of his case, the motion to suppress, the possible presentation of character witnesses, or the possibility of being convicted of a lesser included offense.

On cross-examination, Petitioner acknowledged that following a jury trial Lavinia Jones had been convicted of first degree murder for her role in the shooting. Petitioner said that he did not believe he was guilty of second degree murder, and trial counsel was deficient for not presenting a defense based on duress. Petitioner said that trial counsel did not file any pre-trial motions or conduct any investigation of the offenses. Petitioner insisted that the money he got from the robbery came from Ms. Roper, not the victim. Petitioner said that he did not tell the investigating officers he was coerced into committing the offenses because during the first interview he was intoxicated, and during the second interview he was simply "clearing things up from a different perspective." Petitioner then said that he had mentioned coercion during his second interview with the police officers. Petitioner denied that he was armed during the robbery. Petitioner said that he told the police officers that he had a gun because "they were not trying to make [him] as the trigger man." Petitioner explained that if the prosecutor had offered to recommend a fifteen-year sentence, he would have tried to "talk [him] down some." Petitioner acknowledged it was "all a negotiation thing."

The prosecutor testified that Petitioner's trial counsel tried to negotiate a more favorable sentence for Petitioner, but he refused. The prosecutor said that Petitioner wanted to hear that from him so the prosecutor agreed to meet briefly with Petitioner prior to the guilty plea submission hearing. The prosecutor described the meeting as "cordial" and lasted approximately five minutes. Petitioner asked the prosecutor for a lower recommended sentence, and the prosecutor told him, "you plead guilty to second degree murder and take the twenty or we go to trial." The prosecutor stated that he was prepared to try Petitioner's case, and that the offer to settle extended to Petitioner was the same offer extended to the other co-defendants except Mr. Ferrell who was the shooter.

The post-conviction court accredited trial counsel's testimony and found that Petitioner had failed to show that the assistance provided by his trial counsel was deficient, or, if any deficiencies were present, that Petitioner was prejudiced by trial counsel's representation. The post-conviction court also found that Petitioner was aware of the consequences of his plea and that Petitioner knowingly and voluntarily entered a plea of guilty to the lesser offense of second degree murder.

### III. Standard of Review

A petitioner seeking post-conviction relief must establish his allegations by clear and convincing evidence. T.C.A. § 40-30-110(f). However, the trial court's application of the law to the facts is reviewed *de novo*, without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). A claim that counsel rendered ineffective assistance is a mixed question of fact and law and therefore also subject to de novo review. *Id. State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must establish that counsel's performance fell below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In addition, he must show that counsel's ineffective performance actually adversely impacted his defense. *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). In reviewing counsel's performance, the distortions of hindsight must be avoided, and this Court will not second-guess counsel's decisions regarding trial strategies and tactics. *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). The reviewing court, therefore, should not conclude that a particular act or omission by counsel is unreasonable merely because the strategy was unsuccessful. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Rather, counsel's alleged errors should be judged from counsel's perspective at the point of time they were made in light of all the facts and circumstances at that time. *Id.* at 690, 104 S. Ct. at 2066.

A petitioner must satisfy both prongs of the *Strickland* test before he or she may prevail on a claim of ineffective assistance of counsel. *See Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). That is, a petitioner must not only show that his counsel's performance fell below acceptable standards, but that such performance was prejudicial to the petitioner. *Id.* Failure to satisfy either prong will result in the denial of relief. *Id.* Accordingly, this Court need not address one of the components if the petitioner fails to establish the other. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069. In cases involving a guilty plea, the petitioner must show prejudice by demonstrating that, but for counsel's errors, he or she would not have pleaded guilty but would have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 42, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985).

### IV. Ineffective Assistance of Counsel

#### A. Pre-Trial Motions

Petitioner argues that his trial counsel's assistance was deficient because he failed to provide Petitioner with copies of the pre-trial motions filed on his behalf. Petitioner argues that he would not have entered a plea of guilty if he had seen such motions. Trial counsel did not have a present recollection of giving Petitioner copies of all of the motions, but he testified that he discussed the purposes of the motions with Petitioner. The post-conviction court found that in addition to trial counsel's testimony, Petitioner conceded he had seen trial counsel's motion to withdraw which stated: "counsel would like to show the Honorable Court that he is filing, contemporaneously with

the motion [to withdraw], eight (8) pre-trial motions.” The post-conviction court also observed that Petitioner was present during the hearing on trial counsel’s motion to withdraw during which the State referenced the “multiple motions filed by counsel.”

In his brief, Petitioner denies that he “conceded” that he saw a copy of trial counsel’s motion to withdraw. Petitioner also argues that there is no evidence that he was in the courtroom when the State referenced the pre-trial motions or that trial counsel made notations in his file that he sent the pre-trial motions to Petitioner. We observe that the transcript of the hearing on the motion to withdraw reflects that immediately following the State’s reference to motions, the trial court personally addressed Petitioner. Be that as it may, the post-conviction court found trial counsel’s testimony credible that he discussed all of the pre-trial motions and their purposes with Petitioner, and the evidence does not preponderate against the post-convictions court’s finding that trial counsel’s representation was not deficient in this regard. Petitioner is not entitled to relief on this issue.

#### B. Motion to Sever

Petitioner argues that trial counsel’s advice was erroneous when he told Petitioner that it “was too late” to file a motion for severance of the co-defendants. Petitioner submits that a motion to sever may be made at any time prior to trial. *See* Tenn. R. Crim. P. 14(a). Petitioner contends that a plea of guilty, entered into in reliance on the erroneous advice of counsel, is not knowingly entered. *See, e.g. State v. Raymond Earl McKay*, No. W2006-00920-CCA-R3-PC, 2007 WL 609897, at \*5 (Tenn. Crim. App., at Jackson, Feb. 27, 2007), *no perm. to appeal filed* (finding the defendant’s plea of guilty not knowingly entered into when trial counsel erroneously advised him that he could ask for a suspended sentence if he entered his plea when the defendant was not statutorily eligible for a suspended sentence). Petitioner also submits that there are inconsistencies in the post-conviction court’s findings on this issue that are not supported by the record. The post-conviction court found:

The Court file shows, however, that [trial counsel] filed a severance motion on April 6, 2004, where counsel requested Petitioner’s case be severed from the trigger man, Michael Ferrell. [Trial counsel] testified that he had never told Petitioner it was too late to file a motion. In fact, he said that he mailed Petitioner a letter (admitted as Ex. 4) on April 13, 2004, where he explained that Petitioner’s co-defendant, Mr. Ferrell, pled guilty; thus, there was no longer a reason to argue the severance motion at a hearing. As part of Mr. Ferrell’s plea agreement, he agreed to testify against Petitioner at trial. Co-defendant Lavonia Johnson had also pled guilty and would be a witness at trial. [Trial counsel] explained that it was not necessary to file a motion to sever Petitioner’s case from the other co-defendant, Alcantarius Fentress, because he had spoken with [the prosecutor] and [the prosecutor] agreed to redact the statement of the co-defendant. As such, there was no legal basis to sever Petitioner’s case from Mr. Fentress.

Petitioner argues that the record does not support the post-conviction court's findings that Mr. Ferrell had agreed to testify against Petitioner if he proceeded to trial, or that Ms. Johnson had entered a plea of guilty and also agreed to be a witness against Petitioner. We note that trial counsel's letter to Petitioner dated February 13, 2004, attached as Exhibit 4, indicates that Mr. Ferrell pled guilty to first degree murder and was sentenced to forty years on February 12, 2004, and that trial counsel thought he would be called to testify against Petitioner if Petitioner chose to go to trial. It appears from trial counsel's post-conviction testimony that the motion to sever filed on April 6, 2004, involved Petitioner's other two co-defendants. It also appears from the transcript of the post-conviction hearing that Ms. Johnson was not tried for the offenses until after Petitioner entered his plea of guilty.

Nonetheless, unlike the situation in *McKay* where trial counsel acknowledged providing the erroneous advice that was at issue, trial counsel in the case *sub judice* testified that he did not advise Petitioner that it was "too late" to file a motion to sever. Trial counsel testified that he filed a motion to sever Petitioner's case from that of the remaining two co-defendants. Trial counsel stated:

I did file a motion to sever, which wasn't even necessary because we were – [the prosecutor] and I were already having discussions about statements from co-defendants would not be brought up at trial. We were talking redacting their statements that they made about Mr. Gross. But I went ahead to cover [Petitioner] and cover myself – I did file a motion to sever. I told Petitioner I would take care of that, which I did."

On cross-examination, trial counsel was asked whether he had told Petitioner it was too late to file a motion to sever, and trial counsel responded, "Absolutely not." We reject Petitioner's contention that trial counsel's acknowledgment that he filed the motion "to cover" Petitioner and himself indicates that trial counsel 'believed he needed to 'cover' his deficient performance for not having filed the motion upon Petitioner's request."

The issue is one of credibility which the post-conviction court clearly resolved in favor of trial counsel. Based on our review of the record, we conclude that trial counsel's actions in regard to the severance issue was well within the range of competence demanded of defense counsel. Petitioner is not entitled to relief on this issue.

### C. Motion to Suppress

Petitioner argues that trial counsel was ineffective because he failed to inform Petitioner that he had filed a motion to suppress his statements to the police and that, had he known such motion had been filed, Petitioner would not have entered a plea of guilty.

Trial counsel testified that he, Petitioner, and Petitioner's investigator reviewed the videotapes of Petitioner's two statements to the police and discussed the likely success of a motion to suppress the statements. Trial counsel informed Petitioner that it was "unlikely" that they would



be able to suppress his statement, and Petitioner agreed. Trial counsel filed the motion to suppress on April 28, 2004, two days after Petitioner decided to enter into a negotiated plea agreement. Trial counsel said that he wanted to “go the extra mile” to protect Petitioner’s interests in case he decided not to plead guilty. Trial counsel testified that he discussed the motion to suppress with Petitioner in detail prior to Petitioner’s guilty plea submission hearing. Trial counsel believed that he gave a copy of the motion to Petitioner but could not say for certain that he did.

The post-conviction court accredited trial counsel’s testimony that he informed Petitioner of the filing and purposes of the pre-trial motions, including the motion to suppress. Petitioner’s and trial counsel’s discussion about the merits of a motion to suppress occurred after Petitioner had already expressed interest in pursuing a negotiated plea agreement by letter dated March 4, 2004, and well before the entry of his plea on May 6, 2004. The evidence does not preponderate against the post-conviction court’s findings that trial counsel’s performance was not deficient and that Petitioner had failed to show any prejudice.

Petitioner also argues for the first time on appeal that trial counsel’s assistance was deficient because even though he filed a motion to suppress, he should have done so sooner. This issue was not presented to the post-conviction court and therefore no findings were made. It is settled law that an issue not presented in the petition for post-conviction relief or any of its amendments “may not be raised for the first time on appeal.” *State v. Townes*, 56 S.W.3d 30, 35 (Tenn. Crim. App. 2000), *rev’d on other grounds*, *State v. Terry*, 118 S.W.3d 355 (Tenn.2003); *see also* T.C.A. § 40-30-106(g) (“A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.”). Accordingly, this argument is waived.

After review, we conclude that Petitioner is not entitled to relief on this issue.

#### D. Failure to Prepare for Trial

Petitioner argues that trial counsel inadequately prepared for trial because he failed to identify character witnesses who would testify at trial that Petitioner was non-violent. Petitioner asserts that he could have provided the names of various people such as church members, teachers, and youth counselors who could have served as character witnesses. Petitioner did not call any such witnesses at the post-conviction hearing, and the identity of any character witnesses and the scope of their testimony remains speculative. “When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing.” *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Neither the post-conviction court nor this court may speculate on what a witness’ testimony might have been. *Id.* Thus, Petitioner has failed to establish that he was prejudiced in this regard.

Moreover, based on our review, the evidence does not preponderate against the post-conviction court’s finding that Petitioner had failed to demonstrate that trial counsel’s assistance in this area was deficient.

Petitioner also contends that trial counsel's trial preparation was inadequate because he failed to pursue all available defenses. Trial counsel testified that he discussed a possible defense based on duress or coercion with Petitioner, but he did not feel it was a strong defense. Moreover, Petitioner would have to testify at trial if the defense was asserted. Petitioner does not suggest what other defenses might have been available. The post-conviction court accredited trial counsel's testimony that he pursued the defense of coercion. We conclude that trial counsel's performance fell within the range of competence demanded of defense attorneys. Petitioner is not entitled to relief on this issue.

#### E. Failure to Investigate

Petitioner argues that trial counsel's assistance was ineffective because he failed to thoroughly investigate Ms. Roper's statement to the police. Petitioner insists that he did not rob the victim, Eric Gregory, and that Ms. Roper lied to the investigating officers. Petitioner submits that if trial counsel had been effective in exposing Ms. Roper's false statements, the charges against him could have been reduced to criminal attempt thereby reducing Petitioner's sentence.

Trial counsel testified that he interviewed Ms. Roper and verified her statement that Petitioner and his co-defendants robbed her and Mr. Gregory during the incident. At the post-conviction hearing the following colloquy occurred:

[STATE]:                Okay. Let me ask you about that. You said Ms. Roper lied when she said that y'all [sic] took money off the victim.

[PETITIONER]:        Yes.

[STATE]:                Are you saying that the lie was that you took money directly off the victim as opposed to picking it up off the ground after the victim had thrown it down?

[PETITIONER]:        No. The victim never got robbed.

[STATE]:                Well, you said in a statement to the police that you picked up the money, didn't you.

[PETITIONER]:        The money didn't come from the victim.

[STATE]:                Where did it come from?

[PETITIONER]:        It came from Kenya Roper.

[STATE]: Okay. But don't you understand that it's during the course of a robbery a person was killed, and that's the definition of felony murder? That was going to be your defense?

[PETITIONER]: Yes. But I did not rob Kenya Roper or Eric Gregory.

Other than his conclusory allegation that Ms. Roper's statement was "false," Petitioner offered no evidence at the post-conviction hearing in support of his claim that trial counsel was ineffective for failing to investigate Ms. Roper's statement more thoroughly. Petitioner did not introduce Ms. Roper's statement to the police as an exhibit at the evidentiary hearing, nor did Petitioner present any evidence to show what a more thorough investigation would have uncovered. A petitioner is required to support his allegations with clear and convincing evidence. *See Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998) ("Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence."). Without such evidence, this Court will not speculate as to what information a trial counsel's further investigation might have revealed. *See Black*, 794 S.W.2d at 757 (observing that "[i]t is elementary that neither a trial judge nor an appellate court can speculate or guess on the question of whether further investigation would have revealed a material witness or what a witness's testimony might have been if introduced by defense counsel"). Without the production of clear and convincing evidence in support of a claim for relief, a petitioner fails to establish the prejudice requirement mandated by *Strickland*. *Id.*

Nonetheless, we glean from the transcript of the guilty plea submission hearing and Petitioner's post-conviction testimony that either Ms. Roper or Mr. Gregory at gunpoint threw money on the ground which Petitioner and his co-defendants then gathered up. Petitioner appears to believe that the fact that the money was not taken directly off the person of either Ms. Roper or Mr. Gregory absolves him of any culpability for the shooting.

Initially, we observe that attempted felony murder is not a recognizable offense in Tennessee. *State v. Kimbrough*, 924 S.W.2d 888, 892 (Tenn. 1996). Moreover, even assuming *arguendo* that Ms. Roper was the one who was forced to hand over money at gun point, Petitioner was still subject to prosecution for felony murder. Nor is it helpful to Petitioner's argument if the robbery was not completed. The offense of felony murder is the killing of *another*, committed during a robbery or *attempted* robbery. T.C.A. § 39-13-202(2) (emphasis added).

Regardless, the evidence does not preponderate against the post-conviction court's finding that trial counsel adequately prepared for trial by interviewing all of the State's witnesses. We also conclude that Petitioner has failed to establish any prejudice. Petitioner is not entitled to relief on this issue.

## F. Failure to Inform

Petitioner contends that trial counsel failed to inform him that he might be convicted of a lesser included offense if he proceeded to trial. Petitioner also contends that trial counsel failed to advise him that he might receive a lesser sentence than the maximum sentence in the sentencing range or that the trial court might impose concurrent rather than consecutive sentencing. Petitioner argues that if he had been provided this information he would not have entered a plea of guilty.

As Petitioner argues in his brief, the erroneous advice of counsel during a plea negotiation has been found to constitute the ineffective assistance of counsel under the facts presented in the respective cases. *See e.g. Dedrick Patton v. State*, No. M2003-00126-CCA-R3-PC, 2003 WL 22999443 (Tenn. Crim. App., at Nashville, Dec. 23, 2003), *no perm. to appeal filed* (concluding that the petitioner's plea of guilty was neither knowingly nor voluntarily entered because of trial counsel's failure to confirm the petitioner's range classification prior to entering the plea); *Kenneth Lee Pipkin v. State*, No. 01C01-9608-CC-00328, 1997 WL 749441 (Tenn. Crim. App., at Nashville, Dec. 4, 1997), *no perm. to appeal filed* (concluding that trial counsel's erroneous advice about the petitioner's right to appeal rendered his guilty plea unknowing and involuntary).

Petitioner argues that the failure to inform is tantamount to providing erroneous information. In the case *sub judice*, however, unlike the authorities relied upon by Petitioner, trial counsel testified that he discussed the applicable lesser included offenses with Petitioner a number of times, that he explained the possible sentences attached to the individual charges, and the possibility of consecutive sentencing. At Petitioner's insistence, the prosecutor and trial counsel met with Petitioner at the court house prior to the plea submission hearing during which the elements of the charged offenses and possible sentences were again discussed. Trial counsel testified that he went over the plea agreement and submission process thoroughly with Petitioner, and Petitioner informed the trial court that he understood the charges against him and the respective sentencing ranges. The post-conviction court accredited trial counsel's and the prosecutor's testimony. The evidence does not preponderate against the post-conviction court's finding that Petitioner failed to show any deficiencies in the performance of trial counsel in this regard. Petitioner is not entitled to relief on this issue.

## G. Motion to Withdraw as Counsel

Petitioner argues that trial counsel provided ineffective assistance during the hearing on trial counsel's motion to withdraw because, essentially, trial counsel was unable to persuade the trial court to grant the motion. Specifically, Petitioner contends that trial counsel failed to present Petitioner's reasons for requesting a substitution of counsel and failed to protect Petitioner's right to participate in his own defense.

This appears to be a novel issue within the realm of post-conviction. We observe initially that trial counsel testified that he filed the motion to withdraw because Petitioner told him to "fire" himself from the case. The basis for the motion was apparently Petitioner's failure to cooperate with trial counsel. A hearing was held on the motion during which Petitioner was given the opportunity

to explain to the trial court why he wanted a substitution of counsel. The following colloquy occurred:

[TRIAL COURT]: All right. I have appointed an attorney for you. [Trial counsel] has been working diligently on your case. What seems to be your problem?

[PETITIONER]: He, uh, never do [sic] what I tell him.

[TRIAL COURT]: Well, exactly what are you talking about?

[PETITIONER]: If I ask him to do something, he'll try to talk me out of it and make up excuse[s] or something, you know, it's kind of hard to work with. It's my life on the line, not his, you feel me?

[TRIAL COURT]: Well, [Petitioner], this is the way it is. There are certain things that you have the ultimate decision about and that's whether or not to go to trial, whether or not to testify if you go to trial. But legal strategies and all that is up to the attorney. Now some of the things that you may be requesting that he do, he can't do, either ethically or legally or maybe it makes no sense to do them. That's his job to advise you.

Petitioner sought the substitution of counsel and had the burden of establishing to the trial court's satisfaction that trial counsel was failing to perform in his best interest, had a conflict of interest, or was otherwise unable to discharge the task of representing Petitioner. *State v. Gilmore*, 823 S.W.2d 566, 568-69 (Tenn. Crim. App. 1991). Although trial counsel might have been more articulate, Petitioner expressed his belief that there was a lack of cooperation between himself and trial counsel as the basis for substitution of counsel, which was apparently the same basis as presented in trial counsel's motion. The trial court declined to grant the motion on this basis. Whether an accused is entitled to a substitution of counsel is a question which addresses itself to the sound discretion of the trial court. *Id.* at 569. We decline to find a ground for an ineffective assistance of counsel allegation on this basis.

Petitioner contends that it can be inferred from the trial court's inquiries during the withdrawal hearing about Petitioner's indigency status and its subsequent explanation of Petitioner's "limited rights to his own defense implied to [Petitioner] that his constitutional right to effective assistance of counsel was diminished by his inability to hire an attorney." Petitioner thus submits that his trial counsel's failure to argue at the hearing for Petitioner's effective assistance of counsel, regardless of his ability to pay for such assistance, constituted deficient conduct.

We disagree with Petitioner's interpretation that the trial court implied that Petitioner had "limited rights to his own defense." The trial court did not inform Petitioner that he could not

participate in his own defense or that Petitioner would have to proceed *pro se* if the motion was granted. Trial counsel testified at the post-conviction hearing that he assured Petitioner that he could participate in his own defense, and he stated Petitioner always responded promptly to trial counsel's questions or when Petitioner was asked to make comments relating to the State's discovery. In fact, Petitioner was an active participant in the plea negotiation process, even requesting that he be permitted to speak personally with the prosecutor about the possibility of a lesser sentence. Trial counsel said that Petitioner was cooperative after the motion to withdraw, and trial counsel saw no valid reason to request a substitution of counsel. Finally, because we conclude that trial counsel provided effective assistance, this issue is moot.

As Petitioner observes in his brief, the post-conviction court did not make a specific factual finding as to this issue. Nonetheless, the post-conviction court found that "within the larger ground of ineffective assistance of counsel," Petitioner has failed to establish any deficiencies in his trial counsel's conduct. Petitioner is not entitled to relief on this issue.

## **V. Guilty Plea**

Petitioner argues that his plea of guilty was not voluntarily and knowingly entered into because he did not understand the charges against him and because trial counsel failed to advise him of his options and the probable outcome of various choices he might make. Petitioner insists that his plea only appears voluntary from the transcript of the plea submission hearing because trial counsel told him "to agree with whatever the judge said." Petitioner also contends that he was scared and intimidated after talking with the prosecutor in trial counsel's presence, and that meeting influenced his decision to accept the plea offer.

When an accused enters a plea of guilty, constitutional considerations mandate that the plea be voluntarily, understandingly and knowingly entered. See *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1713, 23 L. Ed. 2d 274, 279 (1969). By entering a plea, the defendant waives certain constitutional rights including the privilege against self-incrimination, the right to a trial by jury, and the right to confront witnesses. *Id.* at 243, 89 S. Ct. at 1714. The defendant's waiver of these constitutional rights may not be presumed from a silent record. *Id.* A plea cannot be voluntary if the accused is "incompetent or otherwise not in control of his mental facilities" at the time the plea is entered. *Blankenship v. State*, 858 S.W.2d 897, 904-05 (Tenn. 1993) (quoting *Brown v. Perini*, 718 F. 2d 784, 788 (6<sup>th</sup> Cir. 1983)). The trial court must ascertain if the defendant fully understands the significant consequences of his or her plea. *State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1977). The trial court may consider a number of factors including the defendant's relative intelligence, his or her familiarity with criminal proceedings, whether the defendant was represented by competent counsel and had the opportunity to confer with counsel about options, the advice given by counsel and the trial court about the charges against the defendant and the penalty to be imposed, and the defendant's reasons for pleading guilty. *Blankenship*, 858 S.W.2d at 904.

The most serious charges against Petitioner were the two counts of first degree murder, premeditated and felony. Trial counsel testified that Petitioner initially had trouble understanding

the concept of criminal responsibility and believed that he was less culpable because he was not the shooter. Trial counsel said that Petitioner understood he could be held liable for the victim's death when he explained a case similar to Petitioner's in which the defendant was found guilty of first degree felony murder with less evidence implicating him in the underlying offense than what was present in Petitioner's case. The prosecutor testified that at Petitioner's request he met with Petitioner and trial counsel for about five minutes before the guilty plea submission hearing. The prosecutor said that he explained the charges against Petitioner and the evidence necessary to support those charges. Trial counsel testified that he read the negotiated plea agreement to Petitioner and went over the plea submission hearing procedure.

The post-conviction court accredited trial counsel's testimony and thus implicitly found that Petitioner was not credible. The post-conviction court found:

After reviewing the testimony and exhibits, the Court finds that Petitioner failed to establish any deficiency or demonstrate prejudice by any alleged deficiency. The Court also points out that during the plea process, the Court explicitly inquired whether Petitioner was satisfied with counsel's representation, and Petitioner answered affirmatively. Based upon Petitioner's responses during the plea colloquy as well as the Court's observation of Petitioner's demeanor, the Court finds that Petitioner was aware of the plea process and its ramifications and that he knowingly and voluntarily entered his guilty plea.

Based on our review of the transcripts of the guilty plea submission and the post-conviction hearings, we conclude that the evidence does not preponderate against the trial court's finding that Petitioner's plea of guilty was voluntarily and knowingly entered. Petitioner is not entitled to relief on this issue.

### **CONCLUSION**

After a thorough review of the record, we affirm the judgment of the post-conviction court.

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THOMAS T. WOODALL, JUDGE